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IN THE

Supreme Court of the United States

October Term, 1977.

No. 77-1689.

LITTON SYSTEMS, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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REPLY BRIEF.

The Solicitor General's Brief focuses on the sensitive and important issue which requires this Court's attention and, indeed, the Brief is tantamount to a request by the government for guidance. The Solicitor General recognizes "the uniquely sensitive position occupied by government counsel whenever parallel criminal and civil proceedings are pending or contemplated against a single litigant." (Brief, p. 13). The litigant, of course, occupies an equally sensitive position. This is because of the inherent conflict of interest in the government's role as public prosecutor and private contractor and the private party's dual role as potential criminal defendant and civil plaintiff with a money claim against the government. No one could dispute that Litton Systems, Inc. ("Litton"), as a potential criminal defendant, is entitled to face a prosecutor whose exercise of discretion is wholly untainted by a civil monetary interest. Equally, Litton is entitled to face an opponent in a civil contract action who is free from temptation to bring its police powers into the civil arena. The two areas were undeniably mixed in this case.

Turning to the government's role as prosecutor, it is clear from the Solicitor General's Brief that the government recognizes no standard, beyond its self-proclaimed good faith, to seal off its prosecutorial discretion from taint by civil self-interest. In this case the Solicitor General himself concedes that *civil contract considerations* entered into the prosecutor's deliberations.[1] And the Fourth Circuit has placed its imprimatur on such conduct, mislabeling it mere "plea bargaining" and ignoring the government's inherent conflict of interest.

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1. In footnote 3 of his Brief, the Solicitor General candidly concedes that "[t]he government attorneys [*i.e.* the prosecutors!] believed that the Board's ruling in petitioner's favor had been based upon certain false representations made by petitioner in support of its claim."

The other side of the coin is the government's role as a civil contractor. The Solicitor General recognizes, as he must, that "[t]he government, of course, must not be allowed to abuse its position as prosecutor to coerce a civil litigant into an unjust settlement[2] . . . ." (Brief, p. 14). A more complete and correct statement would be that the government must not be allowed to use its position as a *prosecutor* to coerce a *civil* litigant into *anything*, particularly at a time when the government admittedly has insufficient evidence of criminal intent to prosecute anyone for anything. That is because to do so creates the very conflict of interest which taints this case. Who can determine what "settlement" or "resolution" is just or unjust when the spectre of the government's unbridled prosecutorial discretion looks over a private contractor's shoulder at any negotiation with the government. The District Court found that the government "used the implied threat of indictment in an effort to obtain reconsideration of what Litton, presumptively innocent, was otherwise entitled to." (A.6)

In an effort to sanitize the prosecutor's determination to indict, the Solicitor General, without any support from the record, asserts that the hastily obtained indictment resulted from some new development of sufficient evidence of fraudulent intent, which the government, after a massive four-year investigation, admittedly lacked (Brief, p. 12) at the time of the threat.[3] This "new evidence" is a

2. There was in fact no civil "settlement" ever proposed in this case. Just the opposite. What the government sought to force Litton to do was *reopen* a civil award that was already *final*, for a potential benefit to the government's own civil self-interest.

3. Indeed, the Solicitor General places the entire freight of his Brief on this slender reed. On the basis of this nonexistent "new evidence" he seeks to distinguish *Pearce*, *Blackledge* and a line of Ninth Circuit cases, as well as to sanitize the mingling of criminal and civil functions. If such evidence never existed (and it did not), the Solicitor General would necessarily appear to agree with Litton as to the serious problem involved here.

figment of the government's imagination. The reference to it in the Solicitor General's footnote 7 is supported only by a citation to conclusory self-serving statements by the assistant United States attorney, not to any actual evidence itself. The true situation is that when Litton, in its request for a Bill of Particulars as to this alleged new evidence, sought to find out what new material had been turned up, the government answered that no further particulars were necessary because it had, prior to the extortionate proposal at issue, "[sat] down with [Litton's] counsel for two hours *going through everything the Government has in its case.*" (Transcript of April 29, 1977 argument on Litton's motion for a bill of particulars, pp. 26-27)(emphasis added). There may have been new summaries after that session, but there was *never* any new substantive evidence of intent to defraud. Therefore, even under the *Blackledge* and *Pearce* standards which apply when only the field of criminal law is involved, the government failed to place in the record any new evidence that would purge the inference of vindictiveness.

Despite this, the Solicitor General concludes his Brief by assuring this Court that "[t]he so-called 'threat' was merely the government's truthful statement that it planned to continue its investigation unless the entire matter could be settled[4] before the Board and that it intended to seek an indictment if evidence of a crime was uncovered."

3. (Cont'd.)

4. Here the government again, as it does throughout the Brief, misleadingly characterizes its proposal as one involving "settlement." As noted in Footnote 2 above, the proposal made was not one to *settle* anything, but rather to *reopen* a final judgment against the government—a result the government could achieve by no other means than coercion.

(Brief, p. 15) This representation is directly contrary to what actually happened. It must be remembered that the threat to indict came after *four years* of unsuccessful investigation and *eighteen months* of unsuccessful presentation to an indicting grand jury empaneled solely to deal with Litton. It came at a time when the government had concluded that, despite this exhaustive investigation, it lacked evidence to indict *any* individual natural person for any knowing attempt to file a false claim—and it has never since sought to indict any natural person. Despite this four year background, the following events occurred with remarkable speed after Litton, on November 1, 1976, rejected the government's threatening proposal. Barely two months later, in early January 1977, the prosecutors handling the case convinced the new Attorney General that they had "developed" the new evidence of intent which had eluded them for four years.[5] Thereafter, the prosecutors empaneled a new grand jury and on April 6, 1977, obtained a one count indictment against the corporation alone. The government has at all times refused to indicate what this supposed "new evidence" of subjective intent was. But significantly, the indictment was only against Litton, though a corporation can only act through its employees who are natural persons. Judge Bryan, the sophisticated trial judge who heard the government's argument on this matter, found unequivocally as a fact that the motivation of the government in obtaining the indictment, under these circumstances, was retaliation against

5. The conference with Attorney General Bell, who was then in his first week in office, was *ex parte*. Neither Litton nor this Court can know what representations were made to him by his subordinates concerning this complex case. However, Judge Bryan concluded that the government's decision to indict was motivated by the vindictiveness of the prosecutors. It must be presumed that this motivation slanted any presentation to the new Attorney General.

Litton for its refusal to capitulate to the threatening proposal. The chronology of events and the refusal of the government to disclose its "new evidence" of intent permit no other inference and fully refute the government's unsupported representation to this Court.

These important issues can and should be decided by this Court now. There is no technical bar to hearing this appeal and this Court regularly grants review of cases in an identical posture, when, as here, the issues are vital and the facts necessary for decision are fully in the record.[6] The very nature of the problem involved in this case compels a prompt resolution. If the perversely reasoned decision of the Fourth Circuit is not corrected now, it is highly conceivable that there may not soon be another chance. If the present case were not reviewed and were then won or plea bargained by Litton, the Fourth Circuit precedent would remain on the books. That would be all the predicate necessary to tempt the government to even further and greater abuse by coercively obtaining civil advantage for the government through the implied threat

6. A few illustrative recent decisions are: *National Broiler Marketing Association v. United States*, 56 L. Ed. 2d 728 (1978) (Circuit Court of Appeals reversed the District Court's grant of summary judgment. The Supreme Court granted the writ of certiorari and affirmed.); *Kulko v. Superior Court*, 56 L. Ed. 2d 132 (1978) (Defendant moved to quash the service of a summons on jurisdictional grounds in the state courts. The California Supreme Court refused to quash the summons. The Supreme Court granted the writ of certiorari and reversed.); *City of Lafayette v. Louisiana Power & Light Company*, 55 L. Ed. 2d 364 (1978) (Defendant's counterclaim was dismissed, but the Circuit Court of Appeals reversed. The Supreme Court granted the writ of certiorari and affirmed.); *Oliphant v. Suquamish Indian Tribe*, 55 L. Ed. 2d 209 (1978) (Petitioner's criminal trial before an Indian Tribunal was stayed pending his petition for habeas corpus in federal court. The District Court and the Circuit Court of Appeals refused to issue a writ of habeas corpus. While the criminal trial was stayed, the Supreme Court granted the writ of certiorari and reversed.).

of indictment. Since the Pentagon is in the Fourth Circuit, the decision below invites the government to control the venue of any indicting grand jury by empanelling it in Virginia. Moreover, unless clear guidelines are pronounced by this Court now, the civil "settlements" coerced in the future by abuse of the government's prosecutorial might would be, as the government euphemistically characterizes them, "voluntary" and the vital issue of abuse would never reach this Court again.

CONCLUSION.

It is fair to say that the Solicitor General's Brief is a tacit plea to this Court for guidance. We respectfully urge this Court to heed that plea, and rescue the government from the dangerous and buoyless sea on which the Fourth Circuit has cast it adrift.

Respectfully submitted,

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